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NATIONAL INDIAN GAMING COMMISSION

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CLASS II CLASSIFICATION STANDARDS

4

GOVERNMENT-TO-GOVERNMENT CONSULTATION MEETING

5

WITH THE SENECA-CAYUGA NATION

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HELD IN OKLAHOMA CITY, OKLAHOMA

8

ON AUGUST 9, 2006

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REPORTED BY: TRENA K. BLOYE, CSR

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1 A P P E A R A N C E S

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4 NATIONAL INDIAN GAMING COMMISSION:

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6 Philip N. Hogen, Chairman

7 Cloyce "Chuck" V. Choney, Commissioner

8 Natalie Hemlock, Special Assistant to the

9 Commission

10 Penny Coleman, Acting General Counsel

11 Michael Gross, Senior Attorney

12 John R. Hay, Staff Attorney

13 Joseph M. Valandra, Chief of Staff

14 Tim Harper, Region Chief, Region V

15 Marcy Pate Olber, Senior Field Investigator

16 Jeanette Ross, Field Investigator

17 Brian Moody

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20 ON BEHALF OF THE SENECA-CAYUGA NATION:

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22 Jerry Dillinger

23 Jess Green

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1 COMMISSIONER CHONEY: Welcome to

2 this Class II Regulation Consultation. For
3 your information these proceedings are being
4 recorded and once they are recorded it's a
5 matter of public record. And if at any time
6 you would like to have a copy of this
7 transcript, it will be on our web site, so you
8 can obtain it through there.

9 If at any time during this
10 proceedings if you would like to discuss any
11 other matters other than Class II pertaining
12 to your tribe, your tribe's gaming operations,
13 feel free to do so, but let us know and we
14 will go off the record.

15 MR. HUNT: I understand.

16 COMMISSIONER CHONEY: Okay. By
17 way of introduction, I want to introduce Phil
18 Hogen. He's the chairman of the National
19 Indian Gaming Commission. I'm Chuck Choney,
20 commissioner, NIGC. And Penny Coleman, our
21 acting general counsel, just stepped out. She
22 will be back shortly.

23 We have Michael Gross from our
24 Office of General Counsel. Tim Harper, our
25 regional director from Tulsa. John Hay from

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1 our Office of General Counsel. Brian Moody,
2 field investigator from our Tulsa region. And

3 Joe Valandra, our chief of staff also has
4 stepped out, as did Natalie Hemlock from our
5 Washington, DC, staff.

6 For the record, if you could
7 identify yourself.

8 MR. GREEN: I will introduce.
9 This is former chief of the Seneca-Cayuga
10 tribe, Jerry Dillinger. He has relinquished
11 his political role and decided to become a
12 regulator. I don't know if that a step out of
13 the fire or toward it.

14 MR. DILLINGER: Seems like
15 everywhere I step is toward it.

16 MR. GREEN: But he is their
17 current commissioner. And, again, he is a
18 former tribal chief.

19 COMMISSIONER CHONEY: And --

20 MR. GREEN: I'm Jess Green. I'm
21 an attorney. I represent a number of tribes.
22 I have represented the Seneca-Cayuga and
23 several others for many years. Most notably
24 in the 1997 initiated multimedia cases which
25 expanded some people's understanding of Class

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1 II, where we supported Penny Coleman's ruling.
2 And ending the last with the Seneca Cayuga
3 cases in 2004 in front of the Supreme Court
4 with their denial cert.

5 COMMISSIONER CHONEY: Okay.

6 Welcome. Chairman Hogen.

7 CHAIRMAN HOGEN: Good morning. We
8 are pleased to be here in this government-to-
9 government consultation for the Seneca-Cayuga
10 Tribe. On 25th of May of this year the
11 National Indian Gaming Commission published in
12 the "Federal Register" some proposals, a
13 proposal to amend a definition, a proposal to
14 adopt a body of regulations that hopefully
15 will better and more clearly distinguish
16 electronic and technologic aids the tribes can
17 use for the play of uncompact Class II
18 gaming from those electronic facsimiles of
19 games of chance and slot machines of any kind
20 that require a Class III compact to play.

21 That was the end of a long
22 drafting process that included the advice from
23 an advisory committee and publishing a number
24 of drafts on our web site.

25 Coupled with the classification

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1 standards, we also have been drafting some
2 technical standards. When we went to the
3 "Federal Register" this spring, we discovered
4 that the technical standards have been on the
5 shelf a little too long. There was some

6 technical developments that hadn't been
7 contemplated. So when we revised those. They
8 will be published in the "Federal Register" as
9 proposed regulations this Friday. And there
10 will be a comment period that will end on the
11 30th of September. We are extending the
12 comment period for these classification
13 standards to correspond with that, the 30th of
14 September.

15 On the 19th of September in
16 Washington, DC we will be holding a public
17 hearing relating to these proposals that will
18 take the form of a number of panels that will
19 address some different areas or different
20 points of view. We expect there will be a
21 tribal panel. There will be a regulators
22 panel. There will be some manufacturers and
23 vendors that will be on the panel. We will
24 hear some economic impact information, as well
25 there will also be a panel of state presenters

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1 to give the state perspectives.

2 Once those processes are complete,
3 that is we have heard what tribes have to say
4 by virtue of these several consultation
5 sessions we have been holding, we will review
6 the comments that have been sent to us, and
7 what is said at the public hearings. We will

8 close the door and look at all of that stuff,
9 look at what we have written, decide, A,
10 should we go forward with regulations of this
11 nature, and, B, if so, should we change what
12 we had proposed in the -- what was published
13 in the "Federal Register."

14 So, in that connection, we are
15 eager to hear what Seneca-Cayuga has to
16 comment on with respect to these proposals.
17 We invite your comments.

18 MR. DILLINGER: Thank you. First
19 I would like to say tribal gaming has enabled
20 our tribe to really, really help our people,
21 particularly our older people and our younger
22 school-age people. I have read these proposed
23 regulations. And economically speaking, I
24 don't see how they are going to help our
25 particular tribe because of the delays and

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1 stuff like that in the game.

2 To me there has always been a
3 pretty clear-cut line between commercial
4 gaming and Class II. And if there's been
5 anything of the running together, it seems to
6 me like it's the Class II -- commercial
7 gaming, Class III emulating Class II machines
8 that pay well for the tribes.

9 Is there any plans underway to
10 regulate commercial gaming from NIGC?

11 CHAIRMAN HOGEN: Well, inasmuch as
12 the Indian Gaming Regulatory Act basically
13 said what Class II was, and then said
14 everything else is Class III, I don't think we
15 will promulgate regulations that will try to
16 define what everything else is.

17 However, we've learned a lot in
18 drafting these technical regulations that, in
19 effect, say what's in the black box, the
20 equipment that makes the software and the
21 hardware secure and so forth. And there may
22 be some of those things in Class II that might
23 also be applied to Class III. But that's
24 still a work in progress.

25 MR. GREEN: Chairman Dillinger's

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1 point is that unless you limit commercial
2 gaming, they are going to copy any financially
3 successful Class II game, and no bright light
4 will exist. There's nothing that prevents
5 them from making a facsimile of something if
6 it makes money. That's their only motivation.

7 Is that not your chief point, sir?

8 MR. DILLINGER: Yes. Some of our
9 best money-making machines are Class II. And
10 the other games, Class III, will make a game

11 just like it. And they won't have to put the
12 delay of dobbing and all of that in theirs.
13 Essentially, there will -- it will drive the
14 Class II out of business, and, yet, we will
15 still have the game, but we will owe the state
16 a certain percentage for it. I don't think
17 the percentage there will go down rather
18 than --

19 CHAIRMAN HOGEN: Well, I would
20 certainly entertain any suggestions you might
21 have as to what regulations NIGC might
22 consider that would be imposed in the Class
23 III area that would protect from that. Right
24 now I don't have a good vision of how that
25 would work, but maybe there is a way it would.

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1 MR. DILLINGER: I, myself, don't
2 either, because it seems like they don't want
3 us to make Class II gaming as sophisticated as
4 Class III, yet there is nothing to keep
5 commercial or Class III from emulating our
6 games. And I don't know the answer to that
7 either.

8 But I am concerned about it. If
9 we lower our standards, because they have come
10 to that point that we're at, then we're going
11 to affect our tribes economically, very much,

12 I think.

13 MR. GREEN: Does the Commission
14 believe it has any authority over commercial
15 gaming whatsoever?

16 CHAIRMAN HOGEN: Well, the
17 definition of terms here. I guess my
18 understanding of commercial gaming would
19 include Class II and Class III.

20 MR. GREEN: Well, but that's
21 governmental gaming, those folks that are
22 corporations that operate at profits and
23 losses. The problem I perceive is that you
24 are attempting to create a bright line, and
25 you are only holding one section of the

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1 industry in place. And if it makes money,
2 commercial gaming will copy whatever it is we
3 do.

4 And if you don't have jurisdiction
5 over those commercial gaming entities, you are
6 not in a posture to create a bright line.
7 Because if anything you do -- you know, even
8 if we had these rules, and low and behold we
9 figure out how a game can make money,
10 commercial gaming will copy that in a
11 facsimile form, so it looks just like it with
12 the loftier steps, because somebody figured
13 out how to make something that makes money.

14 We are well aware that the
15 commercial market in Nevada consists about 20
16 percent of video gaming -- video poker
17 technology, and the reason is players like
18 interaction. From a legal standpoint, the
19 only thing we have always used to win our
20 Class II game litigations is we have got
21 player interaction, and we have interactive
22 connectivity between players. Those two
23 things have pervaded everything.

24 Every federal court judge has
25 always ask, "Why is it not a facsimile?" The

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1 response has always been the player does the
2 last act in the cases that we have litigated.
3 I know you have been an advocate, you have got
4 to be able to sleep. You have the got to be
5 able to do that final act. But that always
6 makes it ease. It's not a facsimile if you
7 can't win unless the player acts.

8 What we are working our way to
9 with this bright line is somebody else can
10 come in and eliminate that, and the game looks
11 just like us. We invented server-based
12 gaming.

13 We now see Class III games coming
14 along that are server based and that are

15 interlinked, because the linking of player
16 competition is popular. People like to
17 compete against other players. That's the
18 thing about live poker these days. I don't
19 have to be smartest person in the room. I
20 just have to be smarter than the other eight
21 people at the table, or seven.

22 And so people enjoy that kind of
23 gaming environment, not all the people, but a
24 lot of the people do. And so all they have to
25 do is copy our game and there is no bright

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1 line. We want to clearly make that point in
2 this consultation, that our bright line
3 efforts are not going to work, because you
4 can't hold commercial gaming if we make money.

5 Where does the Commission get
6 authority over any vendor, the National Gaming
7 Commission?

8 CHAIRMAN HOGEN: Over any --

9 MR. GREEN: Over any vendor to a
10 tribe or any third party. I can't find
11 anything in IGRA. Where?

12 CHAIRMAN HOGEN: Our jurisdiction
13 enforcement-wise, so to speak, would be pretty
14 much limited to those who enter into
15 management contracts or those who manage
16 without management contracts and the tribes

17 themselves and their tribal gaming facilities.

18 MR. GREEN: Well, and yet, in
19 these regulations you are proposing, you are
20 proposing to make yourself the selector of
21 independent gaming labs, which are actually
22 third parties. And you are proposing not a
23 set of regs for how they get selected, but you
24 are proposing to maintain that jurisdiction
25 and usurp that authority from the primary

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1 regulators under IGRA.

2 We think that creates a situation
3 that will require challenge by the tribes.
4 Moreover, I don't think you thought this
5 through -- our compact. I don't think you
6 have studied the compacts. Our compact and
7 other compacts require us to license everybody
8 that touches us. What if have got an
9 independent lab, and we refuse to license
10 them. Or worse yet, what if we revoke their
11 license?

12 MS. COLEMAN: Then you can not use
13 them.

14 MR. GREEN: Well, what if we
15 revoke all the licenses of the people that you
16 approve?

17 MS. COLEMAN: Then you might have

18 difficulty playing Class II.

19 MR. GREEN: But it's not because
20 of us. It's because we license them. And
21 what if the labs refuse to submit licenses
22 because you have approved them? We are in
23 violation of our compact.

24 What if the labs refuse to pay our
25 fees, because we assess fees for people that

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1 come into our jurisdiction and do things that
2 affect us. What if they refuse to submit to
3 our jurisdiction. None of these things are
4 addressed by your regulations. And by
5 establishing their contact at your level
6 rather than ours --

7 MS. COLEMAN: May I ask you this
8 question?

9 MR. GREEN: Sure.

10 MS. COLEMAN: What are you doing
11 now?

12 MR. GREEN: We are sending
13 requests to any lab that wants to be a part of
14 our programs, we send them requests and ask
15 them to come in and be licensed.

16 MS. COLEMAN: And do they?

17 MR. COLEMAN: We are having
18 difficulty. We are having difficulty with
19 insurance companies.

20 MS. COLEMAN: But with respect to
21 the labs, do you work with labs now?

22 MR. GREEN: We do have some that
23 work with labs now.

24 MS. COLEMAN: And are you
25 licensing in those labs?

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1 MR. GREEN: We are in the process
2 of the trying to get the processes down. We
3 didn't previously have to do that until the
4 compact came into existence. Everybody is
5 trying to figure out how to do this. There is
6 any enormous amount of third parties to
7 surrendering to our jurisdiction. That's the
8 first thing they say in their licensing
9 application is they surrender to our
10 jurisdiction. He can't adjudicate anything
11 with them, because, non-Indian, we may not
12 have jurisdiction over them.

13 MS. COLEMAN: Does the compact
14 require licensing of Class II?

15 MR. GREEN: The compact requires
16 licensing at any entity that received more
17 than \$25,000 a year from gaming.

18 MS. COLEMAN: So you take the
19 position that it controls Class II?

20 MR. GREEN: I take the position

21 that it controls vendors, being licensed, if
22 they get more than \$25,000. Because then we
23 have to segregate, have a huge argument with
24 the state if we have to segregate that this
25 money doesn't count, because it came from

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1 Class II gaming. This certification they gave
2 was that it is a compacted game; therefore,
3 that lab has to now be certified.

4 The certifications we are now
5 getting are primarily in regard to our Class
6 III compacted games, because it's required
7 under the compact. Our compact requires us to
8 use labs that you all have previously
9 certified in some capacity. So we have
10 already, by virtue of the compact, recognized
11 that it has to be a lab you all have used for
12 some purpose.

13 But I don't think you have thought
14 this complex relationship that you are
15 attempting to establish with a vendor
16 completely through. More importantly, from a
17 legal standpoint, where is our due process if
18 we say a lab is not independent. And
19 something I have never understood about the
20 Vegas locations in these other jurisdictions
21 when they have the labs make determinations.
22 The determinations they make are as much legal

23 as they are factual.

24 We are set up here in Oklahoma for
25 a huge battle over game classification,

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1 because of something that has been done by
2 some of the major labs. It's an undercurrent
3 that's going through, and I don't want to make
4 it a part of this record. I am simply saying
5 that lab determinations are as much a legal
6 decision, sometimes, as a factual decision.
7 Your regulations give us no place to address
8 the appeal of those decisions.

9 I mean, as a lawyer, if I don't
10 like somebody's decision, I want the ability
11 to go into an appellate mode. You don't give
12 us a place for that. You give us no due
13 process if we disagree with your lab
14 selections.

15 A secondary problem you have got
16 with requiring us to use an independent lab.
17 There is at least one tribe in Oklahoma that
18 has a \$5 million gaming commission budget.
19 Now, that's for one tribe. I mean, you all
20 only have twelve. They are capable of
21 building their own labs. Indeed, I have been
22 to several tribes that have built their own
23 testing labs.

24 Now, we are working at getting
25 that size budget and doing that in our

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1 location. We only have one gaming location.
2 But as it continues to make money, we don't
3 see a need for having an independent lab when
4 we have an independent commission.

5 The Commission is not supposed to
6 be a part of politics. If we're doing
7 verification, if we are accepting verification
8 from other tribes that have those kind of
9 labs, why do we have to have an independent
10 lab?

11 We have surrendered that authority
12 in the compact, because it was given as an
13 offer. It was not negotiated. They were
14 among the points we had objections to. But,
15 again, it was not a negotiated compact that we
16 recently signed.

17 These things present enormous
18 difficulties for us, particularly when your
19 lab issues don't present us any due process
20 opportunities. And when you present us with
21 requirements that I see where a potential
22 conflict can come in, if we disagree with
23 somebody working for the lab that they are a
24 proper person for us to do business with. I'm
25 sorry. I'm sorry, Jerry. I usurped part of

1 your time.

2 MR. DILLINGER: That's all right.
3 That's okay. In closing, I would like to say
4 that I think we have pretty much of an ideal
5 situation the way it is right now. I mean, I
6 don't know about the clear lines between Class
7 II and Class III or any of that. But
8 everything that we have Class II we believe to
9 be Class II through our litigation that we
10 have already done.

11 And we're very happy to regulate
12 our own gaming with oversight from NIGC like
13 is provided for in the IGRA. And our tribe
14 has passed a resolution recently to litigate
15 any of these proposed changes that we think
16 takes away from our sovereignty or our ability
17 to regulate our game. Thank you.

18 CHAIRMAN HOGEN: Thank you very
19 much for sharing your thoughts with us. We
20 will think very carefully about the challenges
21 that were mentioned. We will look at the
22 compacts, and we will try to avoid any
23 irreconcilable problems that would result if
24 we adopted those without looking at what the
25 various compacts say in this connection.

1 MR. GREEN: We anticipate
2 submitting additional comments in writing. I
3 have one other point that I want to make sure
4 I emphasize.

5 The impression of what's being
6 accomplished by these consultations and these
7 regulations tend to be a matter of public
8 record. This press release that I received,
9 which it says, "The National Indian Gaming
10 Commission, NIGC, is continuing its efforts to
11 better distinguish the Indian Gaming
12 Regulatory Act standards for technological
13 aids which Indian tribes may utilize to play
14 bingo and similar Class II games without a
15 tribal state compact.

16 "From slot machines and electronic
17 games of facsimiles of chance which are Class
18 III devices, and require tribes to compact
19 with state governments to play."

20 The paragraph seems to indicate
21 that the whole purpose here is you are trying
22 to distinguish what is Class II and you are
23 trying to require us to reach agreements with
24 the states about everything that we play.

25 CHAIRMAN HOGEN: Well, that can
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1 be read a couple of ways, Mr. Green.

2 MR. GREEN: I'm not saying it's
3 your press release. I'm saying that's the
4 impression that's being given in Indian
5 country. And I'd like to have this made a
6 part of the record.

7 CHAIRMAN HOGEN: Duly noted.
8 Okay. Thank you very much for visiting with
9 us.

10 (Proceedings concluded.)

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